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IN THE

# SUPREME COURT

OF THE

# UNITED STATES

October Term, 1928

No. 210

HART REFINERIES, a Corporation,

*Appellant,*

*vs.*

W. E. HARMON, as
TREASURER OF THE STATE OF MONTANA,

*Appellee.*

# Appellant's Brief

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## BRIEF OF APPELLANT.

1. The above entitled case was decided in the Supreme Court of Montana on the 31st day of January, 1928, and is reported under the title Hart Refineries, Appellant, v. Harmon, Appellee, 81 Montana, 423.

## STATEMENT DISCLOSING JURISDICTION TO REVIEW.

2. It is contended that the Court has jurisdiction to review on appeal the judgment of the Supreme Court of Montana, upon the following grounds:

It is an appeal from the Highest State Court of Montana, wherein there has been drawn in question the validity of a statute of Montana, on the ground of its being repugnant to the provisions of Section One of the 14th Amendment to the Constitution of the United States, providing that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws, and the decision of the Supreme Court of Montana was in favor of its validity.

(a)

The statutory provision believed to sustain the jurisdiction of this Court is as follows:

28 U. S. C. A. Sec. 344, Judicial Code Sec. 237, provides as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where it is drawn in question the validity of a statute of, or an authority exercised

> under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon writ of error."

(b)

A. The date of judgment sought to be reviewed was January 31st, 1928 (R. 26).

B. The petition for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Montana, and allowed by him on the 27th day of April, 1928.

(c)

Appellant's contention is that the Montana Gasoline License Tax Law of the year 1925 taxed the Montana refiner two cents a gallon on all gasoline and distillate he manufactured and sold. It permitted gasoline manufactured in sister states to be shipped into Montana, but required no tax on any such gasoline which was not sold after it had reached a state of rest in Montana. This permitted all gasoline and distillate transported from sister states, which was not resold, after reaching Montana, but which was used or consumed in the state, to avoid the tax. Consumers and dealers were not required to pay a tax on such as they used or consumed, but did not sell. That such discrimination could have been avoided by extending the law to include all gasoline and distillate used in Montana after its interstate character had ceased, and it had come to rest. Such law would have been valid and not in conflict with the Interstate Commerce Clause of the Constitution; but the Montana Court nevertheless held that to tax the use of

gasoline transported from a sister state, after it had reached a state of rest and its interstate commerce status ended, would still interfere with interstate commerce, and be valid.

This was an action brought by Hart Refineries to recover the sum of $6,071.84 (R. 1-14) required of appellant under the Gasoline License Tax Law of the State of Montana for the year 1925 (Mont. 1925, 359, 360). The tax was paid under written protest that the same was unlawful and so received by the State Treasurer. (R. 2, 3. Pars. V, VI). The ground of protest that said tax was unlawful, was that the provisions thereof permitted persons and corporations (R. 5, 6, 7. Pars. XII, XIII) refining gasoline in sister states, and making sales inside and outside the state, before gasoline products were resold, after being brought to rest in Montana, did not require the payment of the gasoline tax of two cents per gallon; that (R. 6, 7. Par. XVIII) plaintiff, who is a Montana Refiner, designated as a manufacturing distributor, was required to pay the tax of two cents per gallon on all gasoline products he manufactured and sold, but refiners from sister states who were competitors of plaintiff were permitted to ship to non-manufacturing distributors, dealers and consumers in Montana, said tax being avoided on all that was not resold after being brought to rest in Montana. That by reason of this discrimination, plaintiff could not compete with his competitors in securing the business of non-manufacturing distributors, dealers and consumers in Montana in plaintiff's territory. That (R. 7, 8. Par. XIX), the competitors from other states sell their products both before and after they arrive in Montana, but no tax being required on such as is not sold after it has reached a state of rest in

Montana, permits all that is transported into the state, and used or consumed, to avoid the tax. Dealers are not required to pay a tax on what they use, and use gasoline for their own delivery trucks, tank wagons, and automobiles for the distribution of their gasoline to their stations over several counties, and such as they use in other lines of mercantile business owned by them, tax free. If such dealers buy of plaintiff or the Montana refiner he has to pay the tax, so will not patronize the Montana refiner. That by reason of the discriminations the manufacture and sale of gasoline in the state by Montana refiners is unjustly and arbitrarily discriminated against.

(R. 11. Par. XXIV). That by reason of the premises plaintiff is denied the equal protection of the laws, and is unable to compete under said law permitting such unreasonable and unlawful discrimination.

(R. 12. Par. XXV). Not only the Montana refiner, but also such dealers, persons and distributors as purchase said gasoline and distillate from Montana manufacturing distributors, (refiners), are denied the equal protection of the law.

That by reason of the premises (R. 13), the said provisions of the said Montana law, are in violation and contravention of the following Constitutional provisions, to-wit:

Section One (1), Article XIV of Amendments to the Constitution of the United States.

The appellant assigned errors of the Supreme Court of Montana, as follows: (R. 32, 33)

"ASSIGNMENTS OF ERROR

And the said Hart Refineries, appellant, assigns the following errors in the record and

proceedings of the said case.

The Supreme Court of the State of Montana erred in rendering judgment in favor of appellee, and against appellant as follows:

First. The Supreme Court of the State of Montana erred in overruling plaintiff's demurrer to the defendant's answer for the reason that the provisions of the Montana Gasoline Tax Law, upon which said tax was based, were unconstitutional and void, by reason of which appellant was injured in its business in the respect hereinafter set forth.

Second. The Supreme Court of the State of Montana should have held Sections 2382 and 2383 of Chapter 186 of the laws of 1925 of Montana void as being in violation and contravention of the provisions of Section 1, Article 14 of Amendments to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws."

Third. The Supreme Court of the State of Montana should have held said tax denied appellant the equal protection of the laws."

The same assignments were made on appeal from the District Court (R. 26, 27).

In the opinion of the Supreme Court of Montana in deciding this case, it said: (R. 27, 28), as follows:

"It is the plaintiff's contention that the statute upon the authority of which the tax was collected is unconstitutional. It is urged that it discriminates between Montana products and those imported into the state; that it is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and also, Section II of Article XII, and Section II of Article XV and Section 26 of Article V of the state Constitution. Section I of the

Fourteenth Amendment, so far as applicable, provides that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor, (shall any state) deny to any person within its jurisdiction the equal protection of the laws. The principal contention is (R. 29) that the law is discriminatory. Upon similar onslaught this Act has been by this Court held to be unconstitutional, (State v Silver Bow Refining Co., 78 Mont. I), and not withstanding the elaborate brief and argument of counsel for the appellant, we see no good reason to change our minds in this regard."

1. The Statute does not violate the Fourteenth Amendment to the Constitution of the United States."

Counsel quotes thus far to show the raising of the Constitutional question and the passing thereon. The decision and its further holding will be referred to in the subsequent argument.

(d)

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States in this action, to-wit:

Ist. As to the application of the provisions of 28 U. S. C. A. Sec. 344. Section 237 Judicial Code heretofore quoted:

Columbia Water Power Co., vs. Columbia Electric St. R. etc., 172 U. S. 475, 488. 489.

Levy vs. San Francisco Sup. Ct. 167 U. S. 175, 177.

Miller vs. Cornwall R. Co., 168 U. S. 131, 134.

Murdock vs. Memphis (20 Wall) 87 U. S. 590, 639, 640.

Scudder vs. New York, 175 U. S. 32, 36.

In Miedricj v. Lauenstein, 232 U. S. 236, 243, this Court said:

> "Where a state Court holds that a federal question is made before it, according to its practice and proceeds to determine it, this Court will regard the question as duly made." (Citations).

In Detroit City Ry. Co. v. Guthard, 114 U. S. 133, 134, the Court said:

> "In Choteau v. Gibson, 111 U. S. 200, it was said: 'From the beginning it has been held, that to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree entered in the case.'"

2nd. The taxation of the use or consumption of gasoline products shipped from sister states, after they have come to rest in the State of Montana, and the interstate commerce status has terminated, is lawful, and does not violate the interstate commerce clause of the Federal Constitution. The 1925 Act could have included the same, and avoided the discrimination complained of:

> Bowman v. Continental Oil Co., 256 U. S. 648, 649.
>
> Texas Company v. Brown, 258 U. S. 475, 476, 480.
>
> Sonneborn Bros. v. Keeling, 262 U. S. 506, 508, 509.

3rd. Failure to remove discrimination against citizens of State, which it was within the province of the Legislature to remove, in favor of products of other states, is in contravention of the provisions of

Section I of the 14th Amendment, and void:

State vs. Silver Bow Refining Co., 78 Mont. 1, 18, 18, saying at page 19:

> "In the first case of State vs. Sunburst Refining Co., above, the Act of 1923 was held unconstitutional because of an unjust discrimination which could have been eliminated," etc.
>
> State vs. Sunburst Refining Co., 73 Mont., 68, 82, 80.
>
> Hart Refineries vs. Harmon (case at bar), 81 Mont., 423, 427, 428.
>
> Sonneborn Bros. v. Keeling, 262, U. S., 506, 520.

The foregoing authorities are considered more fully in the argument contained later in this brief, and relevant parts thereof quoted.

We believe the foregoing shows the jurisdiction of this Honorable Court to review this appeal.

(d)

## STATEMENT OF THE CASE

This is an appeal from a judgment on the pleadings rendered on the 10th day of February, 1927 by the District Court of Lewis and Clark County in favor of respondent, and against appellant, Hart Refineries, whereby it was ordered, adjudged and decreed that the plaintiff Hart Refineries take nothing by its action, and it was further ordered adjudged and decreed that the plaintiff has no further right, title or interest in or to the sum of $6,071.84 involved in said action, and which was paid by the plaintiff under protest, and it was ordered that the said sum be by the defendant State Treasurer taken from the "Protest License Fund" and deposited to the credit of the funds to which it belongs, as provided in Chapter 186,

Laws of 1925 (R. 21).

The complaint is based upon the unconstitutionality of the Gasoline License Tax Law, as set forth in the R. C. of 1921, as amended by the provisions of Chapter 186 of the Laws of the Nineteenth Legislative session for the year 1925, pages 359, 360, which laws provide for the payment of a Gasoline License Tax of two cents per gallon by every distributor for carrying on business in the state, on every gallon of gasoline and every gallon of distillate refined, manufactured, produced or compounded by a distributor and sold by him within this state; that the plaintiff alleges that it paid under protest the sum of $6,071.84 for the manufacture and sale of 303,592 gallons of gasoline and distillate, refined and sold during the quarter ending on the 30th day of September, 1925, by the Hart Refineries, a corporation organized under the laws of Montana, having a refining plant at Missoula, Montana. Plaintiff's complaint alleges substantially as follows: (R. 1-13)

(1). That at all times since April, 1924, plaintiff was and is a Montana corporation, with its principal place of business at Missoula, Montana, and engaged in manufacturing, refining, producing and compounding gasoline and distillates and selling the same in Montana; that the defendant is the State Treasurer of Montana; that under the provisions of Sections 1, 2, 3 and 5, being Sections 2382, 2383, 2384 and 2392 of Chapter 186 of the laws of the Nineteenth Legislative Assembly for the year 1925, plaintiff was required to pay to said State Treasurer a license tax of two cents for each gallon of gasoline and distillate refined, manufactured, produced and compounded and sold by plaintiff in the State of Montana; that for the

quarter ending September 30, 1925, plaintiff refined and sold in Montana 303,592 gallons, by reason of which plaintiff became liable for the payment of two cents per gallon, amounting to $6,071.84. That plaintiff did not ship nor transport any gasoline or distillate into the State of Montana; that within thirty days after the 30th day of September, 1925, the end of the said quarter period the plaintiff paid to the defendant the sum of said $6,071.84, as State Treasurer of the State of Montana, to be held by him pending the outcome of this action to recover the same as paid under protest that the tax was unlawful, which said sum was so received and accepted by him; that the plaintiff deemed said license tax to be unlawful, and at the time said license was paid, and before the tax became delinquent the plaintiff paid said tax to the defendant as State Treasurer of Montana, under written protest that the same was unlawful, and the defendant received and accepted the same as so paid. (R. 1-3, par. 1-6 of Compl.)

(2). That the complaint further alleges (R. 3, 4, Par. VII, VIII, IX) that during all the time appellant was engaged in the refining, manufacture and selling of gasoline and distillate a large number of corporations organized under the laws of the states of the Union, other than Montana, were engaged in the manufacture, refining, and compounding of gasoline and distillate in such states, and were authorized to do business in Montana under the laws applicable to foreign corporations; that on and at all times after April 1, 1925, said corporations were engaged in the manufacture, refining, compounding and production of gasoline and distillate at places within the United States outside of Montana and during said time they were engaged in the shipment and transporting into

Montana of great quantities of gasoline and distillate which were sold by them outside of the State of Montana, and also great quantities of which were sold within the State of Montana before it was brought to rest in Montana, to corporations, persons and concerns within the State; that said corporations at all times from April 1st to Sept. 30th, 1925, maintained places of business without the State of Montana and also within the State of Montana during which time said respective corporations made sales both without the State of Montana and in the State of Montana, before it arrived and was brought to rest in Montana to persons, corporations, dealers, consumers and users in Missoula County and the territory occupied by plaintiff, in quantities by said various corporations respectively of 400,000 gallons per year and amounting in the aggregate to several million gallons, and during all the period herein mentioned said corporations have been competitors of plaintiff;

(3). That none of said persons, corporations or concerns engaged in refining gasoline and transporting and shipping the same into Montana, and in the sale thereof inside and outside of the State of Montana to their respective customers in the State of Montana *before the same has arrived and been brought to rest in Montana and then resold, was required to pay two cents per gallon as a license tax* or any other tax upon the sale of said gasoline and distillate. (R. 5. Par. XII).

(4). That in addition to said foreign corporations other Montana corporations and individuals were during said time engaged in the selling and distribution of gasoline and distillate to persons residing in Montana. (R. 5. Par. XIII).

(5). That under said law the plaintiff is required to pay two cents per gallon license tax on each gallon sold for the privilege of conducting its business, but said competiting foreign corporations, being competitors of plaintiff, solicit and ship orders to dealers and non-manufacturing distributors and consumers in plaintiff's territory, and *sell said products before they arrive and are brought to rest in the State of Montana, at a price of two cents per gallon less than the market price*, by deducting two cents per gallon which plaintiff is required to pay under said law, but which neither said competitors, dealers, non-manufacturing distributors nor consumers are required to pay on such as is transported from without the state *and is not resold after being brought to rest in Montana.* (R. 6, 7. Par. XVIII). That by reason of this discrimination of two cents per gallon the plaintiff is unable to compete in its territory with said corporations from other states in securing the business of non-manufacturing distributors, dealers, users and consumers.

(6). (R. 7, 8, 9. Par. XIX). That plaintiff's competitors solicit orders and ship to dealers and consumers in Montana, large quantities of gasoline *sold in Montana before it has been brought to rest in Montana, and also large quantities sold in neighboring states before it has been brought to rest in Montana;* that many of said dealers in gasoline in Montana are engaged in other lines of business requiring the use of many delivery trucks and automobiles delivering gasoline to customers, their own service stations located over several counties, running delivery trucks for mercantile businesses, owned by them, besides running touring cars and trucks for their own use

and enjoyment; that if said dealers purchase from plaintiff or a Montana refiner the license tax of two cents per gallon is payable on all of such sales which are required to be reported by plaintiff, when, however, such dealers and consumers purchase their gasoline from said competitors of plaintiff who sell and ship the same from neighboring states, or sell the same before it is brought to rest in Montana, the dealer receives the same delivered to him, in Montana, tax free. That the dealer being absolved from all tax until required to be reported by him within 30 days after the end of the quarter, and then, for such quantity only as has been resold by such dealer, as provided by Sections 2383 and 2384, Chapter 186, Laws 1925, such dealers are entitled to have all that they procure for their own consumption and use tax free.

(7). That neither such dealers, foreign corporations, non-manufacturing distributors or consumers of gasoline are required to pay a tax on such gasoline *as is purchased by them before it is brought to rest in Montana, and are not required to pay a tax on such imported gasoline they sell before the same has arrived in and is brought to rest in Montana;* that by reason thereof not only said foreign corporations and non-manufacturing corporations but the dealers who are also competitors of plaintiff solicit orders and *sell such* gasoline tax free, as has been purchased by such *dealers and resold by them before it comes to rest in Montana*, and thereafter delivered from a foreign state direct in original packages to the consumer, or, upon such re-sales as the dealer may make before it comes to rest in Montana, and thereafter delivered either in broken or unbroken packages, tax free (R.

9). The Montana dealer may purchase gasoline before it comes to rest in Montana, resell it before it comes to rest in Montana, and then after it has come to rest in Montana, deliver it either in broken or unbroken packages, tax free.

(8). That by reason of the premises such dealers and consumers ceased and refused to purchase from Montana manufacturers and from plaintiff, but purchase from plaintiff's competitors, and plaintiff is unable to compete with said competitors, and by reason of the said two cents per gallon which plaintiff has to pay and which his competitors do not have to pay the plaintiff's customers have been lost to him, and plaintiff and Montana manufacturers have been and are unjustly and arbitrarily discriminated against by reason of being a manufacturer and taxpayer in the State of Montana.

(9). That by reason of the premises the plaintiff lost for the quarter ending September 30th, 1925, a profit of $4,000.00 it would otherwise have realized, and will continue to lose $1,500.00 per month, by reason of the discrimination in favor of said foreign corporations. (R. 9, 10).

(10). That by reason of the premises and said discrimination in favor of non-manufacturing distributors and dealers, the plaintiff lost for the quarter ending September 30th, 1925, a profit of $4,000.00 which it otherwise would have realized, and will continue to lose $1,500.00 per month. (R. 10. Par. XXI).

(11). That the imposition of said two-cent license tax on plaintiff is the sole cause of the inability of plaintiff to sell gasoline and distillate to persons within Montana, at the prices which have been paid by such persons to the corporations and individuals

hereinbefore mentioned, and but for said tax plaintiff would be able to meet such prices and to sell substantially all of the gasoline which it manufactured, to persons within the State of Montana. (R. 10. Par. XXII).

(12). That no part of said license tax prescribed was for police regulation or supervision of oil refineries but said license tax, when paid, is used for revenue purposes only. (R. 11. Par. XXIII).

(13). That by reason of the premises the plaintiff is denied the equal protection of the laws as against its competitors established in other states, in the State of Montana, and in plaintiff's territory in Missoula, and Western Montana, and is unable to compete under said law permitting such unreasonable, unlawful and arbitrary discrimination, and said gasoline license tax law is in violation and contravention of Section 1 of Article XIV of Amendments to the Constitution of the United States, and is void. (R. 11. Par. XXIV).

(14). That by reason of the premises said gasoline license tax law permitted foreign corporations to exercise and enjoy within the State of Montana, greater rights, privileges and immunities, under the laws of the State of Montana, than those enjoyed by plaintiff, a domestic corporation, and other manufacturing distributor corporations of similar character organized under the laws of the State of Montana, which is in violation and contravention of Section Eleven (11) of Article Fifteen (XV) of the Constitution of the State of Montana. (R. 11. Par. XXV).

(15). That the imposition of said license tax constitutes an unjust discrimination against appellant, a domestic corporation, and in favor of foreign and

other domestic corporations and individuals; that such tax is not uniform in its operation upon the same class of subjects, to-wit: upon gasoline and distillate sold by domestic corporations, being manufacturing distributors, within the territorial authority of the State of Montana, which levies the tax, and such as is sold in other states to non-manufacturing distributors, dealers and consumers within Montana, before it has arrived and been brought to rest in Montana, and such as is sold in Montana, before it has arrived and been brought to rest in Montana, by foreign corporations, non-manufacturing distributors, domestic corporations, dealers and individuals doing business in the State of Montana; that by reason thereof the provisions of Sections 2382, and 2383 of Chapter 186 of Laws of 1925 are in violation and contravention of the provisions of Section Eleven of Article XII, of the Constitution of the State of Montana. (R. 11-13. Par. XXV).

(16). That by reason of the premises said law is in violation and contravention of Sections One (1) and Seven (7) of Article Twelve (12) of the Constitution of the State of Montana.

(17). That by reason of the premises there is due and owing plaintiff the sum of $6,071.84 for which plaintiff demands judgment. (Tr. p. 18).

(18). The answer of the defendant admits the allegations of paragraphs I to XI inclusive of plaintiff's second amended complaint, except the defendant alledges insufficient knowledge as to whether the corporations mentioned in Paragraph VII or any other corporation or individuals with places of business out of the state transported into the state gasoline, or made sales within their respective states outside of

Montana or within Montana, before it arrived in and was brought to rest within Montana for delivery to persons, corporations, dealers and consumers in Montana in quantities alleged in paragraph IX, or in any amount, and as to whether said parties were competitors of plaintiff, and defendant denies that some of said corporations enumerated in Par. VII, were authorized to do business in Montana. (R. 14, 18).

(19). The answer admits the allegations of paragraphs XIII, XIV, XVI and XVII, and alleges insufficient knowledge as to Par. XV. Admits that the State of Montana does not regulate the manufacturing, refining or compounding of gasoline or distillate, or the sale or distribution thereof within the State of Montana.

(20). The answer denies the other allegations of plaintiff's complaint.

(21). The plaintiff demurred to the defendant's answer on the ground that it did not state facts sufficient to constitute a defense to plaintiff's second amended complaint, which demurrer was overruled. (R. 19).

(22). The plaintiff replied denying all affirmative matter set forth in defendant's answer as amended. (R. 19).

(23). The defendant moved for judgment on the pleadings. (R. 20). This admitted the truth of matters of fact pleaded.

(24). The motion for judgment on the pleadings was sustained and judgment entered for the defendant and against the plaintiff. (R. 20).

(25). The plaintiff filed its notice of appeal from the judgment. (R. 25).

(26). Petition for Appeal, Assignments of Error, and Prayer for Reversal, presented and filed April 27, 1928. (R. 32, 33).

(27). Order allowing Appeal filed April 27, 1928, by the Chief Justice of the Supreme Court of Montana, fixing bond in sum of $1,000,00, and directing the record be sent to the Supreme Court of the United States, within sixty days.

(28). Citation, issued in usual form, showing service on L. A. Foot and others. (R. 34).

(29). Bond on Appeal for $1,000.00 approved and filed, May 2, 1928. (34).

(30). Praecipe for Record and service thereof filed May 16, 1928. (R. 35, 36).

(31). Clerk's Certificate of Transcript. (R. 36).

(32). Statement of Points to be Relied Upon Designation of the parts of the Record to be printed, and service of same, filed June 19, 1928.

(33). Endorse on cover: File No. 33,519, No. 210. Filed June 16, 1928.

(e)

All of the assigned errors are hereby specified as intended to be urged by counsel for appellant, to-wit:

As set forth (R. 32, 33), and hereinbefore set forth at page — hereof. Said Assignments of Error raise the sole question of appellant's claim that the law involved is in violation of Section I, of the 14th Amendment to the Constitution of the United States, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws.

## SUMMARY PRECEDING ARGUMENT

It is appellant's contention that the Montana License Tax Law of 1925 discriminates against the Montana refiners. This discrimination could have been prevented, by having included in said law, taxation of gasoline shipped from sister states, after its interstate commerce status was terminated and it was at rest in Montana, by applying to such as was used or consumed. Said law limited the gasoline tax on such as was shipped from sister states, to such as was sold after it had been brought to rest in Montana. It eliminated all shipped for consumption or use, or consumed or used after it had reached a place of rest in Montana and its interstate commerce status terminated. That the Legislature of Montana had authority to have lawfully included in said law, the taxation of such gasoline as was shipped from sister states and used or consumed, which would have avoided such discrimination. That such a law would not be any burden upon, or regulation of interstate commerce. That the Supreme Court of Montana erred in holding that such law avoiding said discrimination would be a burden on interstate commerce.

That the holding of said law as invalid would entail little loss to Montana, as only a few thousand dollars, perhaps less than fifty thousand dollars, remains unpaid under said law of 1925. In 1927 the Legislature of Montana passed a gasoline license tax law, removing said discrimination, just as suggested above, by extending said tax to the consumption and use. It stands independent of the 1925 Act, and over two million dollars have been paid under it. No objection has been raised to it as Montana manufactured products are not discriminated against in favor of products of

sister states. The declaring of the 1925 Act invalid would not affect the collection of gasoline license taxes as they have all been paid under the 1927 Act, since January first, 1927.

The appellant, as a Montana refiner, under the 1925 gasoline license tax law, was required to pay two cents a gallon on all gasoline manufactured and sold, but said law did not require any tax on gasoline shipped from other states to pay said tax, nor any tax on gasoline which was not sold after it was brought to rest in Montana. The law did not require said tax, nor any tax, on such gasoline as was shipped into the state for consumption or use, or which was used and not resold. After gasoline shipped from sister states had completed its interstate commerce status, and had come to rest in Montana, it could have lawfully been included in such license tax. To do so would not be any interference with, or burden upon interstate commerce. The Supreme Court of Montana held in this case (81 Mont. 426), as follows:

> "As to the contention that products may be imported into the state for consumption without the payment of a tax, and thus users are induced to deal with outside concerns when their needs are sufficiently great to warrant buying in bulk and thus withdraw their patronage from dealers within the state, the situation is one which cannot be remedied by state legislation. By Sections 9 and 10, Article I, of the Constitution of the United States, the regulation of interstate commerce is granted exclusively to Congress; Congress has long since acted on the subject, and 'the states have no power by taxation or otherwise to retard, impede, burden, or in any manner control, the

> operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' "

Again, it was held by the Supreme Court of Montana,

> State v. Silver Bow Refining Co., 78 Mont. 1, 19:
>
> "In the first case of State vs. Sunburst, above, (73 Mont. 68), the Act of 1923 was held unconstitutional because of an unjust discrimination which could have been eliminated under the decision in Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095, holding that 'a tax on the sale of oil imported after it had come to rest in the state would be neither a regulation nor a burden of the interstate commerce of which the oil had been the subject.' "

That said law could have been extended to include such gasoline as was shipped into the state for consumption or use, or was consumed or used, was decided by this Court in the cases of Bowman v. Continental Oil Co., 256 U. S. 648, 649. Texas Company v. Brown 258 U. S. 475, 476, 480, 481, 482. Sonneborn Bros. v. Keeling, 262 U. S. 506, 508, 509, which cases are hereinafter cited in the argument.

The allegations of appellant's complaint raise these issues.

## ARGUMENT

The effect of a decision of this Court validating the principle involved in this controversy would, under such law, entirely destroy the refining industry of the State of Montana, and have a most far-reaching effect on the oil industry of the State requiring freight rates shipping the oil from the State for refining, raising the price and in the end defeating the very object of the law, which is to raise revenue.

It may be noted here that to hold said law invalid would entail no appreciable loss to the State of Montana, as only a few thousand dollars above what is involved in this action remains unpaid. The heavy penalty feature of the law, of ten per cent and one per cent per month, (Mont. 1925, Sec. 2384), for nonpayment leaving few who had the courage to refuse payment. Then the taking effect of the law of Jan. 1, 1927, (Mont. Laws 1927 P. 30), removed the discrimination, in a companion measure, running along with this law, which did just what appellant claims should have been done by the law in controversy, extended it to require the tax to be paid on all gasoline used in Montana, after it had reached a state of rest in Montana, and its interstate status terminated. Over two million dollars have been collected under this 1927 Act. The Act involved being declared invalid, would not effect the law of 1927, under which all taxes have been paid since Jan. 1, 1927, which reaches all imported and consumed or used.

The effect of a decision of this Court foreclosing any attack upon the 1925 Act, might bring about a repeal of the 1927 Act, and leave the discrimination, which was cured by the 1927 Act, still stand, with all its iniquities.

Said Act of 1927, (Mont. 1927, Chapter 19, at Page 30), eliminating said discrimination is, in part, as follows:

> "(6). The word 'handle' means to produce, refine, manufacture, compound, or import gasoline, or to purchase gasoline for one's own use, upon which the license tax herein imposed has not been paid."
>
> "(7). The word 'Dealer' means and includes any person who engages in the business

in the State of Montana of producing, refining, manufacturing or compounding or of purchasing in this State, or of importing into this State, gasoline for sale or use in this State. Such gasoline, for the purpose of this Act shall be deemed to be 'handled' by the dealer."

"Section 2. Every dealer shall pay to the State Treasurer A LICENSE TAX for engaging in and carrying on such business in this State in an amount equal to three cents for each gallon of gasoline handled by him in this State while engaging in such business as heretofore defined."

That such a law as the 1927 Law could be lawfully passed by the Legislature, was alleged in appellant's answer, in the following language, which was admitted by the motion for judgment on the pleadings, to-wit: (R. 17).

"That in the passage of said gasoline license tax law upon which plaintiff relies for recovery in this action, it was within the province of the Legislative Assembly of the State of Montana, which passed said law, to have so framed said law that every advantage accruing under said law, would have remained under said law as a gasoline license tax law, whereby said law would have been more general in its application, and extended to cover the inequalities in this answer mentioned, causing said tax to apply to the parties herein mentioned in whose favor said law discriminated, making said law and said discriminations unnecessary and arbitrary, as against the defendant and Montana manufacturing distributors, and said Legislative Assembly could have lawfully passed a commodity tax or a user's or consumer's tax, to apply after shipments to and into the State of Montana, were within the jurisdiction of the State of Montana, for purposes of taxation, and

thereby have created a more general tax which would have met all of the benefits of the 1925 Act, and have extended its application to have avoided the unnecessary, arbitrary and unjust discriminations herein mentioned."

The 1927 Act increased the tax to three cents a gallon, and in increase above that is probable in the future. The higher the tax naturally the greater the discrimination.

When gasoline is shipped into Montana for use, or which is used in Montana, there comes a time between the shipment and use, when it has terminated its interstate commerce status. At this point, it is within state jurisdiction and authority to tax. To do so is no interference with interstate commerce. Upon this theory the gasoline tax law of 1927, was based and very properly so.

Appellant's contention has been, not that the law was invalid because it did not tax such gasoline as was in interstate commerce but, on the contrary, that the law should have avoided discrimination against the Montana refiner, by extending the tax to such gasoline as was consumed or used after it had come to rest in Montana and its status in interstate commerce ended.

Under said Act the gasoline license tax law, did not extend to any gasoline or distillate not sold after its arrival in the state, thereby permitting all gasoline shipped from sister states to consumers to be used, tax free, while if such consumer bought a Montana product, he would have to pay the tax.

The provisions of the Montana Gasoline License Tax Law of 1925 necessary to show the points at issue are quoted as follows:

"Section 2382. Every distributor shall pay * * * to the State Treasurer a license tax for engaging in and carrying on such business in this State, in an amount equal to two cents for each gallon of gasoline and two cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into, and distributed and *sold* by him within this state; *after it had arrived in and was brought to rest within this State*, whether sold in original packages or broken packages."

"Section 2383. Every dealer shall * * * when engaged in such * * * business in this state, pay the State Treasurer * * * a license tax for engaging in such business in this State equal to two cents for each gallon of gasoline and two cents for each gallon of distillate *sold* or distributed by such dealer in this State during such year, provided, however, that no gasoline or distillate sold by said dealer, which was purchased from a producer who had paid the tax thereon, shall be included or considered in determining the amount of such license tax to be paid by such dealer, *but only* such gasoline and distillate as was shipped, transported, or imported into this State and purchased by such dealer before it had arrived and was brought to rest within this State *and then resold* by such dealer, whether in original packages or in broken packages, shall be included or considered for the purpose of computing the amount of such license tax."

Sec. 2381 of Rev. Codes of 1921, is as follows:

"Section 2381. 'Person,' 'distributor' and 'dealer' defined. As used in this act: The term 'person' means and includes every individual, firm, association, joint-stock company, syndicate, and corporation.

> The term 'distributor' means and includes every person who engages in the business in the State of refining, manufacturing, producing, or compounding gasoline or distillate, and selling the same in this State; and also every person who engages in the business in this State of shipping, transporting or importing any gasoline or distillate into, and making original sales of the same, in this State.
>
> The term 'dealer' means and includes every person, other than a distributor, who engages in the business in this State, of distributing or selling gasoline or distillate within the State."

This law requires the *Montana refiner* to pay two cents per gallon on all gasoline and distillate he manufactures and sells.

It does not require such tax on any gasoline as is *imported by refiners located in sister states*, which is not sold in Montana.

It does not require such tax upon such as is shipped by *distributors or dealers* in Montana, from sister states, until it is *sold*, after it is brought to rest in Montana.

Gasoline imported to consumers, from sister states could have been included in said tax, after it had reached a state of rest in Montana, and completed its interstate commerce status, but was not.

Gasoline imported to dealers, from sister states, used for their own consumption, could have been included in said tax, after it had reached a state of rest in Montana, and its interstate status was terminated, but it was not.

The tax permitted competitors of appellant to ship gasoline from sister states and, after it had come to rest in Montana, use it tax free, which could have

been lawfully brought within the tax, but was not.

Said law permitted dealers to purchase gasoline in sister states, ship it to Montana, and after its status in interstate commerce had ceased, and the gasoline was in their own storage tanks, use such as they desired for their own consumption, tax free.

The effect of such discrimination was such that the Montana refiner who paid a tax of two cents per gallon, could not compete against sales of gasoline imported from a sister state which was not required to pay two cents a gallon, nor any tax, if sold to consumers, importing distributors and dealers in the State of Montana.

The Montana refining and manufacturing industry could not survive under said discrimination.

The allegations of appellant's answer brought it within the decision of this Court in the late case of Bowman v. Continental Oil Co., 256 U. S., 648, 649, as follows:

> "With the excise tax as imposed upon the *use* of gasoline by plaintiff at its distributing stations, in the operation of its automobile tank wagons and otherwise, we have no difficulty. Manifestly, gasoline thus used has passed beyond interstate commerce, and the tax can be imposed upon its use, as well as upon the sale of the same commodity in domestic trade, without infringing plaintiff's commercial rights under the Federal Constitution. * * * The tax imposed by the act under consideration upon the "sale or use of gasoline sold or used in this state," is not property taxation, but in effect, as in name, an excise tax. We see no reason to doubt the power of the state to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale and use; and since the tax operates impartially

upon all, and with territorial uniformity throughout the state, we deem it "equal and uniform upon subjects of taxation of the same class, within the meaning of Section 1 of Article 8."

Appellant's answer raised the same question, to-wit: (R. 7, 8, Par. XIX.)

That the competitors of appellant:

"Solicit orders for and ship to dealers and consumers in Montana, large quantities of gasoline and distillate sold in Montana before it has arrived and is brought to rest in Montana, and also large quantities of gasoline and distillate sold in said neighboring states before it has been brought to rest in Montana; that besides being such dealers in the sale and delivery of said gasoline and distillate, many of the said dealers operate other lines of business requiring the use of many delivery trucks and automobiles in delivering gasoline to their customers, their own service stations located over several counties, running delivery trucks for mercantile businesses owned by them, besides using touring cars and trucks for their own use and enjoyment," etc.

The complaint also further alleges: (R. 7, Par. XVIII.)

That by reason of this discrimination of two cents per gallon, plaintiff is unable to compete with said corporations from other states in the territory of plaintiff in securing the business of non-manufacturing distributors, dealers, users and consumers in plaintiff's territory in Montana. That among the important consumers for whose business plaintiff is unable to compete in its territory by reason of their exemption from said tax when they buy gasoline which is shipped from out of the state, but purchased

before it has been brought to rest in this State, are the Chicago, Milwaukee and St. Paul Railway Company and the Northern Pacific Railway Company, who, prior to the enactment of said law, were important and profitable customers of plaintiff, but whose business by reason of the premises has been lost to plaintiff.

Again, in the later case of

Texas Company v. Brown, 258 U. S. 475-476,

the Court said:

> "Plaintiff makes the broad contention that inspection charges, amounting in effect to taxation, cannot be imposed even upon that part of its products which has come to rest within the state, or is disposed of in domestic trade, in view of the fact that all of it has come from other states. But American Steel & Wire Co. v. Speed, 192 U. S. 500, 520, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365, settles the principle that goods brought into a state, not from a foreign country, but from another state, having reached their destination, and being held in storage awaiting sale and distribution, enjoying the protection which the laws of the state afford, may, without violation of the commerce clause, be subjected to non-discriminatory state taxation, even though still contained in original packages. This decision is in line with the previous cases of Woodruff v. Parham, 8 Wall. 123, 140, 19 L. Ed. 382, 387, and Brown v. Houston, 114 U. S. 622, 632, 634, 20 L. Ed. 257, 260, 261, 5 Sup. Ct. Rep. 1091, and it was pointed out that their authority was not overruled by Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, or other cases of like character."

In the same case, at page 480, the Court said:

"That the legislature intended the effect of the tax to fall upon the ultimate consumer is evident, not only from the obviously inevitable result of requiring its payment, ordinarily, by the first domestic seller, but from the specific provisions of the amendatory Act of 1913, that the 1912 Act "shall apply not only to gasolenes, benzins, and napthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia, for consumption or use. Where such commodities or any of them may be purchased within the state, or without the state, and brought into the state, by any person, firm, or corporation, not for the purpose of selling or offering the same for sale, but for the purpose or use or consumption by the purchaser in manufacturing or other lawful uses, either as a fuel or otherwise, the inspections herein prescribed shall be made, and the fees above fixed shall be paid therefor."

In the same case, at Pages 481 and 482, the Court said:

"The peculiar qualities of illuminating oils and gasoline seem to us a sufficient warrant for putting them in a class by themselves for excise taxation upon their sale or use. So we held in Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. Ed. 1139, with respect to an excise tax upon the sale or use of gasoline, under a provision of the Constitution of New Mexico, not differing materially."

In Sonneborn Bros. v. Keeling, 262 U. S. 506, 508, 509,

The Court said:

"Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of

rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

In Foster-Creighton Company v. Graham, (285 S. W. 570) 47 A. L. R. 971

commenting upon the foregoing question and decisions the Court said: (Page 975)

"We think the effect of the amendatory Act of 1925 when properly interpreted, is to reach gasoline that is stored and thereafter withdrawn and used without being sold by any person, etc."

"Under the act of 1923, a large consumer, desiring to escape the tax levied by the Act, could do so by buying his gasoline in quantities, say in tank lots, storing it, thereafter withdrawing it, and using it as needed. In such case there would be no intrastate sale or distribution within the meaning of said act, and such consumer would not, therefore, be subject to the tax."

"It was manifestly the purpose of the legislature in passing the amendatory act, to cut off this avenue through which large consumers might evade the tax."

"We think the act, when properly interpreted not only applies to distributors and dealers in gasoline, but applies to consumers who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow

the same to be withdrawn from storage, whether such withdrawal be for sale or other use. It therefore follows that complainant and all other persons, etc., in like situations, come within the provisions of the act."

Page 977:

"The validity of a tax on the use and consumption of gasoline has been recognized and sustained by the Supreme Court of the United States in the two recent cases of Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. Ed. 1139, and Texas Co. v. Brown, 258 U. S. 466, 66 L. Ed. 721.

The decisions of the Supreme Court of Montana as set forth in the case of State v. Sunburst Refining Co., 73 Mont. 68, and State v. Sunburst Refining Co., 76 Mont. 472, sustain appellant's contention in these cases. In those cases the Court concedes, that if there was a discrimination affecting the Montana refiner, which could have been eliminated by said act, and was not, it violates the provisions of the 14th Amendment to the Constitution of the United States.

The Montana Court erred in holding that such discrimination could not be removed.

The Court said in

State v. Sunburst, 73 Mont. 68, 82:

"It may be accepted, then, as settled beyond all further controversy that gasoline or distillate, brought into this state from a sister state and stored in original packages, afterward to be sold in this state, is no longer an article in interstate commerce, but is merely property in this state, and as such does not enjoy any greater privilege or immunity than gasoline or distillate manufactured in this state. In other words, such gasoline or distillate, though brought here from another state and held in

> the original packages for sale in this state, is subject to a property tax, or may be made the basis of an occupation tax, the same as gasoline or distillates manufactured in this state."

Again, the Court said in said decision at Page 80 as follows:

> "What, then, is the basis of the classification made by this statute etc. * * * The only ground upon which the attorney general seeks to justify the classification is that the statute discriminates only between a business which is a lawful subject of license tax, and one which is not, and this contention has its foundation in the assumption that a license tax imposed upon any one who sells in the original packages gasoline or distillate shipped into this state from another state, would constitute a burden upon or regulation of interstate commerce. If this assumption were justified, the argument in support of it would be unanswerable, but since the assumption is altogether unwarranted, the argument falls of its own weight."

It is the contention of appellant that the Court erred in not holding the same decision in the case at bar by holding that said gasoline license tax law of 1925 could have been extended, to avoid such discrimination against the Montana refiner, which was in fact done by the legislature in the year 1927, which was made to and did apply to all gasoline sold or distributed from and after December 31, 1926. That only by reason of said supplemental law was the appellant and Montana refiner enabled to continue in business.

The Supreme Court of the State of Montana, in passing on said 1925 act said, in

> Hart Refineries v. Harmon, 81 Mont. 423, 427:

"The principal contention is that the law is discriminatory. Upon similar onslaught this Act has been by this Court held to be constitutional (State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301), and notwithstanding the elaborate brief and argument of learned counsel for the appellant, we see no good reason to change our views in this regard.

1. The statute is not violative of the Fourteenth Amendment to the Constitution of the United States. (State v. Silver Bow Refining Co., supra) That which would invalidate the law because of unjust discrimination has been thoroughly considered in the case last cited, and in the two cases entitled State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428; Id., 76 Mont. 472, 47 A. L. R. 969, 248 Pac. 186.

The law is now settled. As was well said by Mr. Justice Matthews, speaking for this court in the Silver Bow Refining Co. case: 'As to the contention that products may be imported into the state for consumption without the payment of a tax, and thus users are induced to deal with outside concerns when their needs are sufficiently great to warrant buying in bulk and thus withdraw their patronage from dealers within the state, the situation is one which cannot be remedied by state legislation. By sections 9 and 10, Article I, of the Constitution of the United States, the regulation of interstate commerce is granted exclusively to the Congress; Congress has long since acted on the subject, and "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government".'

* * * * *

"Under the authority of the case of Sonne-

> born Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643: 'It may be accepted * * * as settled beyond all further controversy that gasoline or distillate brought into this state from a sister state and stored in the original packages, afterward to be sold in this state, is no longer an article in interstate commerce, but is merely property in this state, and as such does not enjoy any greater privilege or immunity than gasoline or distillate manufactured in this state. In other words, such gasoline or distillate, though brought here from another state and held in the original packages for sale in this state, is subject to a property tax, or may be made the basis of an occupation tax, the same as gasoline or distillate manufactured in this state.' (State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428.

The foregoing holding is certainly contradictory, holding that if the law had extended to tax the use of gasoline, it *would* have been interstate commerce and that it *would* not have been in interstate commerce.

All seem to agree that the tax could have been extended to gasoline used and eliminate the discrimination, and the 1927 Act actually did so, and yet the decision of the case at bar holds that it could not be done, and in the former cases that it could have been done, and that if it could have been done, but was not, that it violated Section One of the 14th Amendment.

In State v. Sunburst Refining Co., 73 Mont. 68, 82, the Court said:

> "It may be accepted then, as settled beyond all further controversy that gasoline or distillate brought into this state from a sister state and stored in the original packages, afterward to be sold in this state, is no longer an article in interstate commerce, but is merely property

> in this state, and as such does not enjoy any greater privilege or immunity than gasoline or distillate manufactured in this state. In other words, such gasoline or distillate, though brought here from another state and held in the original packages for sale in this state, is subject to a porperty tax, or may be made the basis of an occupation tax, the same as gasoline or distillate manufactured in this state."

The Court said, in

> State v. Silver Bow Refining Co., 78 Mont. 1, 19:
>
> "In the first case of State v. Sunburst Refining Co., above, the Act of 1923 was held unconstitutional because of an unjust discrimination which could have been eliminated under the decision in Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095, holding that a tax on the sale of oil imported after it had come to rest in the state would be 'neither a regulation nor a burden of the interstate commerce of which the oil had been the subject."

Under the 1925 law, transportation companies having passenger stages and freight trucks, running in numerous directions out of Missoula and other towns of the state, could purchase the foreign product, store it in their tanks after the transportation was entirely over, and use the same, tax free. Thereby parties whose sole business was the use of the highways were not required to pay a tax, and the market is lost to the Montana refiner, and the State of Montana loses the benefit of a tax. Also parties can contract to do trucking, making all deliveries for numerous mercantile establishments, and can thus secure their gasoline without tax. Numerous instances occur of various characters to the same effect.

The following further allegations of appellant's

complaint appear and are admitted by the motion for judgment on the pleadings, viz:

That said discriminations in favor of foreign corporations and foreign refiners for the quarter for which said tax was paid, ending September 30th, 1925, by reason of shipments from sister states, caused appellant a loss of $4,000.00 and by said discriminations in favor of non-manufacturing distributors and dealers during said period, caused appellant a loss of $4,000.00. R. 10. Par. XXI).

That the imposition of said tax of two cents per gallon was the sole cause of the inability of appellant to sell said gasoline causing appellant's loss. (R. 10. Par. XXII).

That the said gasoline tax was imposed by the State of Montana, solely for revenue purposes, and none was used for police regulation or supervision of oil refineries or the sale and distribution of gasoline and distillate. R. II. Par. XXIII).

That by reason of the premises appellant was denied the equal protection of the laws of Montana.) R. II. Par. XXIV).

Illustrations have been set forth showing the actual discrimination against the Montana refiner in the working out of the law, and many others logically occur. As said by the Supreme Court of Montana, State vs. Sunburst Refining Co., 73 Mont. 83:

> "The statute very clearly authorized such successive taxes, and the test is, not what has been done under it, but what may be done under it. (State ex rel. Holliday v. O'Leary, 43 Mont. 157)."

In conclusion it is most earnestly contended by appellant that the 1925 gasoline license tax law was dis-

criminative against Montana industries in favor of the products of refiners of gasoline in sister states, transported to Montana; that the discrimination could lawfully have been avoided, but was not; that it was of such a character that the Montana refiner was unable to compete and that the refining industry of Montana could not survive under it. That it was arbitrarily and unjustly discriminative and void.

Wherefore appellant respectfully submits that said judgment should be reversed, and the judgment of this Court, require that the sum of money involved in this action, to-wit: $6,081.74, paid under protest by appellant, be ordered restored to the "Protest License Fund," referred to in the judgment, (R. 21), and that judgment be had and given in favor of appellant for the said sum involved, and for costs.

Respectfully submitted,

JOHN E. PATTERSON,

Counsel for Appellant.